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I. Toward A New Judicial Activism

During the past half century, the principle of judicial deference to legislative decision-making has generally prevailed whenever economic and social regulatory schemes have been challenged on constitutional grounds. Among the effects of the 1937-38 struggle over the composition of the Supreme Court and, more pointedly, over the nature of judicial review itself, has been the notion that the involvement of courts in the formulation of public policy, both national and state, ought to be minimized, if not altogether precluded. At its zenith, deference produced levels of restraint so sweeping that it bordered upon judicial abdication; indeed, from time to time, a recurring pattern of nonintervention promoted charges of evasion and irresponsibility. The Court's image of postured inaction, sustained by an extravagant and recurring rhetoric, ranged well beyond respect for time-honored presumptions of validity.

To be sure, the vagaries of due process and equal protection offered neither dependable nor readily defensible standards on which judicial activism might be based. Yet the abrupt shift from the cavalier negativism of the past cannot be explained simply by reference to uncertain criteria or, for that matter, to the customary catalogue of causes such as changes in the Court's membership, a lack of expertise or alterations in judicial philosophy. The enigma of the early years remains.[1] Meaningful review, accompanied by an intermittent and limited revival of substantive due process, did not reappear until

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1. An imaginative but inconclusive effort to delve into the "mysteries" of the Court's remarkable turnabout appears in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

the late 1960s.[2] More explicit admissions of the propriety and the necessity of some return to a judicial critique, even in the proscribed economic and social areas, did not emerge until the advent of the Burger era.[3] All the same, judicial concessions have been meager, the occasions for such indulgences have been sporadic, and the opinions have been replete with a repetitive apologia offering assurances of the vitality of the principle, if not always the realization, of deferential review.

Lest it be assumed that the intervening three decades represented the Court in eclipse, the record reveals subtle, albeit covert, clues to intervention. While unabashed allusions to a judicial role of renewed activism have been sparse, alternative routes, less familiar in the appraisal of economic and social schemes, have been periodically pursued. Restrictive views of the commerce power, a limited revival and application of the contract clause and a narrowly focused view of federal preemption standards, for example, led to occasional judicial negatives despite lavish and oft-repeated avowals of deference.[4] More recently, a resort to substantive due process has been openly conceded, though such a step seems still to be taken almost as an act of desperation when all other avenues of decision-making have been found wanting.[5]

As the Court's aversion to systematic review continues to diminish, so equal protection increasingly has come to be the predicate relied upon in the assessment of economic and social legislation. The guidelines are unsettled and inadequate for principled adjudication.[6] The first decades of the twentieth century found the equal protection clause treated as little more than an ancillary to due process. Perhaps Justice Holmes was given to hyperbole when he characterized equal protection as the "last resort of constitutional arguments."[7] Nevertheless, the clause rarely found favor as a substitute for due process. A single holding of unconstitutionality on equal protection

2. *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (identification of a procedural-substantive dichotomy in a wage garnishment case); Shapiro v. Thompson, 394 U.S. 618 (1969) (expansive reading of a right to travel); Stanley v. Georgia, 394 U.S. 557 (1969) (articulation of a fledgling right of privacy).

3. Perhaps the Court's most controversial venture related to assertion of an affirmative constitutional right to an abortion in Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973).

4. *See* Friedelbaum, *Reprise or Denouement: Deference and the New Dissonance in the Burger Court*, 26 EMORY L.J. 337 (1977).

5. The dangers implicit in reembracing substantive due process were candidly explored in Moore v. City of East Cleveland, 431 U.S. 494 (1977).

6. An exhaustive review of the equal protection clause in evolution may be found in *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

7. Buck v. Bell, 274 U.S. 200, 208 (1927).

grounds, reached somewhat reluctantly in a 1957 case, arose from an isolated state scheme founded in exceptional conditions.[8] Though the Court ultimately moved to overrule this "derelict" decision,[9] too many divergent interpretations of the clause have occurred to permit any easy revival of extravagantly permissive review.

Suspect classifications, initiated in the midst of the Second World War, grew slowly and guardedly during succeeding decades.[10] Concomitantly, a theory of fundamental rights began to develop.[11] Like suspect classifications, it required rigorous scrutiny and a reverse presumption of validity which virtually assured a negative result. By contrast, the simple rationality test almost ineluctably led to a finding of constitutionality in the regulatory sphere. Criticisms of the two-tier approach — centering on its lack of versatility and its mechanistic applications — eventually suggested an intermediate standard of scrutiny currently associated with gender-related cases.[12] While the proposed Equal Rights Amendment was pending before the states, it seemed inappropriate and perhaps unnecessary to extend the list of suspect classifications that, in practice, markedly narrowed the range of policy options open to the Court.

Despite misgivings concerning what has emerged as a tripartite classification of scrutiny levels, the most provocative aspect of equal protection analysis remains the rationality test. Minimal review, routinely applied to economic and social programs, offered few surprises as the Court repeatedly rejected its former role as a "superlegislature." Yet it has been precisely in terms of rationality that much of the ferment has occurred and that the divisions on the Court may well become most pronounced.

II. Equal Protection in Transition: Old Guidelines Reexamined

A flurry of cases, decided during the past several terms of the Supreme Court, raises intriguing questions concerning the breadth of the rational basis test. No longer is the Court limited to an examination of acts characterized as wholly irrelevant to the legislative pur-

8. *See* Morey v. Doud, 354 U.S. 457 (1957).

9. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

10. The first reference to a "suspect" category appeared in the Japanese evacuation case, Korematsu v. United States, 323 U.S. 214 (1944).

11. The habitual criminal sterilization case, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), is generally described as the first decision establishing fundamental rights or interests.

12. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

pose. If standards continue to be unpredictable and subject to modification as individual cases arise, at least a measure of reliability and constancy attaches to the basic principle of intervention. The outcome cannot be predicted with certainty, and new tests have been devised and applied, albeit on a varying scale, to a far broader range of cases than had heretofore been considered possible.

Even as the Court reiterated its "proper" regard for legislative judgments in the early 1970s, a majority revealed a subtle shift in the direction of the less indulgent guidelines more recently enunciated. Justice Powell, writing for seven members of the Court in *Mcginnis v. Royster*,[13] sustained the validity of a complex state sentencing system. The scheme distinguished between the lack of "good-time credit" toward parole eligibility for those subjected to presentence county jail imprisonment and the award of such credit to those who had been released on bail prior to sentencing and who subsequently were committed to state prisons. The latter, the state alleged, performed under a rehabilitation program (unlike that fostered in the county detention centers) and so merited good-time credit for the entire period of their confinement.

In response to challenges filed by county prisoners on equal protection grounds, a three-judge federal district court upheld their claims because of the absence of a rational basis for the statutory distinction.[14] The Supreme Court reversed, predicating its decision essentially on a slightly skewed application of the same test. Yet Justice Powell placed a curious emphasis on legislative purpose while ostensibly repudiating any "speculative probing" into the intent of a coordinate branch.[15] At the opposite end of the spectrum, Justice Douglas, joined by Justice Marshall, would have affirmed on the basis of what he described as an invidious discrimination.[16]

In the years that followed, the Court declined to expand the list of subjects liable to strict scrutiny or to add to the fundamental rights previously articulated. Instead, a more rigorous application of existing standards became evident, almost by indirection. The cases did not involve economic and social regulation within the accepted meaning of the phrase. For the most part, they touched upon areas that were accorded varying degrees of heightened scrutiny when, in fact, no more than minimal review was conceded.[17] By the middle of

13. 410 U.S. 263 (1973).
14. *See* Royster v. McGinnis, 332 F. Supp. 973 (S.D.N.Y. 1971).
15. McGinnis v. Royster, 410 U.S. 263, 276-77.
16. *Id.* at 281, 283.
17. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Wein-

the decade, a majority announced parenthetically that a rational basis standard need not be a "toothless" one.[18] Yet equal protection analysis remained nominally within the bounds delineated earlier even if, as a growing number of cases revealed, the challenged classifications were notably more diversified.

The origins of the debate currently in progress are traceable to a 1980 case, *United States Railroad Retirement Board v. Fritz*.[19] At issue were provisions of the Railroad Retirement Act of 1974 designed to restrict and to condition employee eligibility for "windfall" benefits. Changeover and cutoff dates were established to reduce the number of persons qualified to receive dual payments from the railroad and social security systems. In what was perhaps its most controversial section, the law drew distinctions between employees who had more than ten but less than twenty-five years of service tied to the existence or want of a "current connection" to the railroad industry as of the changeover or retirement date. It was this feature that came under searching examination when it was challenged on fifth amendment due process and equal protection grounds before a federal district court. In an action for declaratory relief, a group of employees charged that the differentiation between classes of annuitants was not "rationally related" to the avowed congressional purpose, that is, to insure the solvency of the system and to preserve vested benefits. The district court agreed and found the section in question unconstitutional.[20] A direct appeal was taken to the Supreme Court.

Justice Rehnquist's opinion for the Court fell within the traditional pattern of deferential review. While admitting the absence of a uniform or consistent test under the equal protection clause, he had little hesitation in establishing the rational basis standard as the touchstone of decision. There followed conventional notations that classifications need not conform to models of mathematical precision and that ill-advised or unartfully prepared legislation, without more, did not offend constitutional prescriptions.[21] Justice Rehnquist avoided any inquiries into group pressures and their effects in the legislative forum. Since the classification was neither arbitrary nor

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berger v. Wiesenfeld, 420 U.S. 636 (1975); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973).

18. Mathews v. Lucas, 427 U.S. 495, 510 (1976).

19. 449 U.S. 166 (1980).

20. *Id.* at 174. The opinion of the United States District Court for the Southern District of Indiana is unreported.

21. *Fritz*, 449 U.S. at 175.

irrational, any investigation of the drawing of lines ended when "plausible reasons for Congress' action" had been provided.[22]

Justice Stevens, concurring in the judgment, adopted an intermediate approach to the review of economic and social schemes. He did not insist upon identifying the "actual purpose" of the legislature because to do so would place an undue emphasis on motivation or acknowledged goals, both of which might be unknown. The appropriate test to be applied, as Stevens explained it, was the discovery of a "correlation between the classification and either the actual purpose of the statute or a legitimate purpose" that might reasonably be presumed to have prompted an "impartial" legislature to act.[23] In this case, he found that the actual purpose was clear; the elimination of dual benefits was a legitimate objective and the distinctions drawn represented an "impartial" method for carrying into effect the intent of the statute.[24]

Justice Brennan, joined by Justice Marshall, dissented in *Fritz*. It was this opinion, to a far greater extent that the Court's expression of views, that suggested a major reappraisal of long-held standards of deference. Despite perfunctory disclaimers, the rational basis test was no longer to serve as a mechanical mode of review — one that virtually assured a pro forma endorsement of what had been enacted. It was meaningless cant for Justice Brennan to disavow "second-guessing" the wisdom of legislative classifications when, in fact, he sought a searching examination of the means and ends of Congress. The operable criteria, as these began to emerge, required courts "first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives."[25] Such guidelines clearly went beyond the ostensible effort to view with skepticism the claims of Government attorneys.

Though Justice Brennan announced that the mode of analysis being advanced had been established by "governing precedents,"[26] the cases cited bore little, if any, relation to those generally associated with the regulatory area. The guidelines followed in educational

22. *Id.* at 179.
23. *Id.* at 181.
24. *Id.* at 182.
25. *Id.* at 187.
26. *Id.* at 183.

entitlement,[27] gender-related,[28] and age discrimination[29] controversies are not analogous to those applied in an examination of economic and social legislation. Furthermore, it is impossible to dismiss statements that seem to invite renewed judicial delving into the special interests responsible for specific acts and the possibility that Congress might have been misled. Such a probe into the legislative record touches upon delicate questions of motivation that are reminiscent of the interventionism of the pre-1937 era even though, as seems apparent, a full-scale resurgence of activism still is remote and the results thus far have been far less invidious and pervasive.

What prompted Justice Brennan to embark upon a reevaluation of the doctrine of deference looking toward a major restatement of the judicial role? Had the abandonment of self-abnegation, so long a part of the Court's unchallenged legacy, actually been in process since the early 1970s when a limited version of substantive due process had been reintroduced to protect a varied assortment of "libertarian" interests? Was meaningful review of economic and social schemes no more than a logical and perhaps an unavoidable consequence of the heightened scrutiny that has increasingly found favor among the Justices? Did the adoption of new and more searching criteria, admittedly limited to a minority, reflect a dramatic breakthrough and the resolve of others currently on the Court? That Justice Brennan's articulation of principles went beyond his dissatisfaction with the railroad retirement act amendments need not be belabored. What remains conjectural is the extent of the Court's willingness to establish a new activism and, more pointedly, whether a majority can be relied upon to convert these convictions into controlling constitutional doctrine.

If legislative restrictions upon retirement benefits had evoked strongly held views concerning the nature and extent of deference, an even sharper exchange occurred when challenges were leveled against a congressionally authorized supplemental security income program that differentiated allowances on the basis of the status of the recipients. The program, in the form of amendments to the Social Security Act, had restricted funds for the indigent blind, aged and disabled to a small monthly grant of "comfort money" while they were being treated or were in custodial care as patients in pub-

27. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973).

28. *See* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

29. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

lic institutions. This reduced stipend was denied entirely to otherwise eligible persons confined in facilities not receiving Medicaid funds. Since large numbers of those excluded, ranging in age from twenty-one to sixty-four, consisted of the mentally ill, members of this group filed a class action in a federal district court charging that the legislative classification violated the equal protection component of the fifth amendment's due process clause.[30]

The court elected to treat the case as one premised upon a "mental health" classification and, therefore, akin to but not precisely equivalent to such suspect designations as race and national origin. Since the mentally ill constituted a "politically impotent, insular minority,"[31] the opinion noted, their treatment warranted an intermediate level of judicial scrutiny. It followed that the classification had to bear a "substantial relation" to the object of the Act, assessed in light of its "primary purpose."[32] The court found no articulated legislative intent to exclude the mentally ill inmate from the benefits, nor any "possible unexpressed purpose"[33] for the denial of comfort money. In addition, the Government's arguments for exclusion, largely relating to the conservation and use of scarce resources, paled when measured against the rights of inmates similarly situated.[34] Thus, the eligibility requirements could not survive judicial examination.

The Supreme Court, in *Schweiker v. Wilson*,[35] rejected the district court's characterization of the Act's differential standards and its assumption that the statute set apart the mentally ill for disparate treatment. Justice Blackmun, who wrote for a five-justice majority, sustained the classification as one advancing "legitimate legislative goals in a rational fashion."[36] By way of a chary reaffirmation of the doctrine of deference, the Court pointed to the traditional restraints that judges are obliged to observe in a democratic state. Justice Blackmun cautioned that choices, looking toward the solution of economic and social problems, lay primarily with representative bodies unless fundamental rights are threatened or the distinctions drawn are inherently invidious.[37] Yet, for all of this vapid litany, the Court's rehearsal of familiar principles seemed somewhat strained.

30. Sterling v. Harris, 478 F. Supp. 1046 (N.D. Ill. 1979).
31. *Id.* at 1052.
32. *Id.* at 1052-53.
33. *Id.* at 1053.
34. *Id.* at 1053-54.
35. 450 U.S. 221 (1981).
36. *Id.* at 234.
37. *Id.* at 230.

The defense of a denial of the "reduced stipend" or "limited gratuity" had a hollow ring, and the call for a "strong presumption of constitutionality" no longer carried with it the intensity that it had previously conveyed.

If, in Justice Blackmun's opinion, there was implicit recognition of a need to appraise a concededly "sparse"[38] legislative record and a finding that Congress' exclusionary action was "deliberate" and "intentional,"[39] Justice Powell's dissent imparted a new vitality and, in part, even an urgency to an examination of legislative purpose. Routine allusions to the archetypical bases of deference were followed by a marked skepticism in the fashioning of points of reference tied to the assessment of retrospective reasons for legislative policy choices. Equal protection, as Justice Powell perceived it, required a determination of "actual" purpose supported by legislative history.[40] This "marginally more demanding scrutiny," in turn, tested the "plausibility of the tendered purpose," thus preserving something more exacting than a perfunctory rational basis analysis.[41] Applying these new standards, Justice Powell had little difficulty in finding the elimination of a comfort allowance less than convincing and carrying significant risks that "irrational" distinctions were being made. He attributed the disparities in treatment to legislative oversight and thoughtlessness, leading to results that served no discernible interest.[42]

Not only had the dissent become more forceful since Justice Brennan's initial foray, just a few months earlier, in *Fritz*, but Justice Powell's new posture also added to the ranks of those who had departed from the traditional test, bringing their number to one short of a majority.[43] The old deferential review, suggesting little more than a presumed statement of facts to sustain legislative choices, was considerably less secure. No longer could the government blithely rely upon a permissive equal protection test that assumed little or no role, other than a legitimating one, for the judiciary. An indulgent approach to economic and social schemes was not axiomatic. In fact, even the majority's professed convictions had been shaken for all of the outward fittings and dauntless rhetoric. The outlook was uncertain and, if past experiences with doctrinal

38. *Id.* at 235.
39. *Id.* at 236.
40. *Id.* at 244.
41. *Id.* at 245.
42. *Id.* at 239, 247.
43. Justice Powell was joined by Justices Brennan, Marshall and Stevens.

patterns served true, a periodic redefinition seemed to be in the offing. The facile and readily met tests of the previous decades could not be taken for granted in a Court that had visibly outlived the easy deference of the post-1937 era.

The scope of judicial intervention in economic and social cases returned to traditional, less intrusive levels as the Court proceeded to weigh the merits of a major federal regulatory program under the commerce clause. At issue in *Hodel v. Virginia Surface Mining & Reclamation Association*[44] was a surface mining control act intended to protect environmental interests, to conserve natural resources and to guard against the despoilment of the land and the degradation of the quality of life generally. In a sweeping attack on the constitutionality of the statute, coal producers and others sought declaratory and injunctive relief by way of a pre-enforcement challenge. A federal district court found provisions of the act to be violative of the tenth amendment, of the just compensation clause of the fifth amendment and of procedural due process requirements.[45] The Government sought review before the Supreme Court on direct appeal.

Justice Marshall's opinion, which sustained the law, rejected these alleged defects. The principal thrust of the Court's review centered about the charge that the act served to displace the freedom of state action in structuring "integral operations" pertaining to a traditional state function. From the outset, then, the outcome depended upon the construction of the Court's precedent-setting 1976 decision in *National League of Cities v. Usery*,[46] in which, for the first time in four decades, an act of Congress predicated affirmatively upon the commerce clause had failed to survive. It was the impact of the tenth amendment, rather than the breadth of the commerce clause per se, that served as the critical pivot. Since Justice Marshall found that the challenged law did not regulate the state as a state, any negative effects emanating from *National League of Cities* failed to materialize. The Court applied no more than a minimal rational basis test in deferring broadly to the legislative will.[47] Missing was any impetus for the more searching inquiry that an increasingly vocal minority had advanced in reviewing regulatory measures on equal protection grounds. Perhaps the traditionally unassailable

44. 452 U.S. 264 (1981).

45. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980).

46. 426 U.S. 833 (1976).

47. Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 281.

bulwark of the commerce clause and the "progressive" character of the legislation in question served to deter any intrusive judicial role. If *National League of Cities* and a series of earlier cases had raised the possibility, remote though it might be, of negating untoward legislative forays by way of the commerce clause, efforts to establish federal strip-mining regulation did not fall within the questionable zone.

Justice Rehnquist and Chief Justice Burger, both of whom concurred in the judgment, were the only members of the Court who raised significant questions concerning the extent of congressional power under the commerce clause. Justice Rehnquist, in particular, noted pointedly that there are limitations upon the authority of Congress to regulate under the clause. Both he and the Chief Justice stressed the need to demonstrate that the affected local activities had a substantial or cumulative impact upon interstate commerce before the national regulatory power came into play.[48] It was largely concern for maintaining an appropriate federal-state balance that prompted Justice Rehnquist to depart from his extremely deferential posture when, as in the past several cases, challenges had been leveled under an equal protection banner. Whether the substance of the act itself had any persuasive effects in provoking these critical comments is a question that finds no grounding in the opinions and must, therefore, remain conjectural.

Similarly, the Court responded in traditional fashion when equal protection challenges were pressed with greater fervor in a companion case. *Hodel v. Indiana*[49] emphasized the so-called "prime farmlands" provisions of the strip-mining regulatory statute. Mine operators were required to demonstrate that the croplands exploited would be restored to the prevailing productivity levels of the surrounding area once surface mining had been completed. Additional safeguards were included and, viewed in its entirety, the law established a comprehensive protective and restorative program. Because of the sweeping nature of the plan and expectations of adverse economic effects, the State of Indiana and several coal mine operators challenged the scheme on a variety of grounds including the commerce power, fifth amendment due process and equal protection, the tenth amendment and the just compensation clause of the fifth amendment. A federal district court sustained these constitutional

48. *Id.* at 305, 310-11.
49. 452 U.S. 314 (1981).

objections and issued a permanent injunction.[50] The Supreme Court noted probable jurisdiction and reviewed on direct appeal.

Apart from the commerce clause, tenth amendment and "taking" claims, which had been addressed within a different context in the Virginia case, the equal protection issues assumed a position of major significance in the Court's disposition of the Indiana controversy. Justice Marshall responded at length to the district court's findings. He denied that, because of the absence of a variance procedure available to steep-slope and mountaintop operators in Virginia and in like topographical regions, impermissible discrimination existed against the states of the Midwest in which prime farmlands predominated as mining sites. Relying on a time-honored presumption of rationality attaching to social and economic legislation, Justice Marshall rejected such allegations in the absence of a clear showing of arbitrariness. The lack of uniform geographic impact did not suffice, he noted pointedly, to produce a proscribed result.[51] Justice Marshall admonished the court below for acting as a superlegislature and substituting its policy judgment for that of Congress.[52]

The presence of a commerce clause predicate, still one of the principal mainstays of the federal police power, apparently served to prevent any broad inquiries into congressional motives and means. A majority was not ready to move beyond the narrow tenth amendment strictures set out in *National League of Cities*[53] and, therefore, no more than an oblique assault upon the commerce power could be sustained. Unless considerations of federalism were forcefully advanced and state prerogatives were directly and emphatically imperiled, deferential review would remain the prevailing standard.[54] Thus, a collateral attack by way of due process or equal protection would not succeed or even figure prominently. In sum, when the commerce clause assumes centrality in the constitutional configuration, voting arrangements conform to accustomed norms with no discernible attention to the "marginally more demanding scrutiny"[55] of which Justice Powell had written in his dissenting opinion in

50. Indiana v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980).

51. Hodel v. Indiana, 452 U.S. 314, 332-33.

52. *Id.* at 333.

53. *But see infra* notes 96-107 and accompanying text.

54. *Cf.* United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982). In *United Transportation Union*, a state once again invoked *National League of Cities* in alleging that a state-owned railroad's labor-management relations were governed by state law rather than by the Federal Railway Labor Act. Chief Justice Burger, writing for a unanimous Court, insisted that the operation of railroads was not an area of traditional state concern.

55. *Schweiker*, 450 U.S. at 245.

Schweiker.

A confluence of equal protection and due process themes, revealing notable similarities in the interests that merit protection, emerged in *Logan v. Zimmerman Brush Co.*[56] In a prior ruling that displayed not only a lack of sensitivity for the claims of the physically handicapped but also the absence of a proper regard for a flexible standard of timeliness in judicial review, the Supreme Court of Illinois had refused to permit the state's fair employment practices commission to overcome the effects of bureaucratic error. The commission's oversight in scheduling a hearing five days after the expiration of the statutory deadline was held to extinguish an employee's cause of action in redressing alleged discrimination against him. Despite the complainant's contention that his fourteenth amendment rights had been violated and that permission to file a second charge was in order, the state court adopted an unyielding position. A failure to comply with the mandatory schedule, the Justices asserted, meant that jurisdiction had to be denied; to do otherwise would alter the design of the statute and unduly burden the public interest in expediting a prompt resolution of disputes.[57]

The Supreme Court's response on appeal reflected the unanimity of the Justices in condemning the harsh procedures and the results that the state court had sanctioned. Yet the choice of a mode of intervention divided the Court. Justice Blackmun's majority opinion went to the familiar property component of contemporary due process. A right of access to the courts, as well as a correlative right to use the adjudicatory procedures of an administrative agency, was said to be a state-created entitlement protected by the Constitution.[58] More puzzling is a separate opinion by Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor, premised upon an equal protection claim. Though Justice Blackmun had served by assignment as the writer of the controlling opinion, he apparently felt that the alternative predicate for decision was sufficiently compelling to warrant independent treatment. The claimant's equal protection argument, he noted, was an unconventional one that had been argued and briefed.[59]

How was it possible to charge an equal protection violation when the underlying statute contained no explicit classifications that

56. 455 U.S. 422 (1982).

57. Zimmerman Brush Co. v. Fair Employment Practices Comm'n., 82 Ill. 2d 99, 411 N.E.2d 277 (1980).

58. *Logan*, 455 U.S. at 428-33.

59. *Id.* at 438.

distinguished between claimants? Had not the differentiation, if any, occurred by a mere act of administrative inadvertence? Justice Blackmun stated pointedly that it was the gloss placed upon the law by the state's supreme court, not the legislature's framing of the statute, that had created disparate treatment and which, in effect, had established two categories of claims. Because the commission, so portrayed, could "operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process,"[60] the state system reflected arbitrary action and the statute itself was contrary to the lowest level of equal protection scrutiny. Thus, as Justice Blackmun viewed it, the melding of the act with the terms of its application and construction by the courts brought it within the boundaries of impermissible state action.[61]

A concurring opinion by Justice Powell, joined by Justice Rehnquist, gave additional support to equal protection as the rationale of choice in resolving the issues presented in *Logan*. If anything, Justice Powell looked askance at an expansive due process which, as he saw it, characterized the prevailing opinion. Instead, he expressed a preference for an equal protection standard comparable to that applied in recent cases. The challenged classification, unusual though it might be, had not conformed to a minimal rationality standard; it represented arbitrary and irrational state action within the meaning of the fourteenth amendment. Apparently, Justice Powell's sole objection to Justice Blackmun's separate equal protection exposition was its doctrinal breadth.[62] Otherwise, a majority of six clearly would have embraced equal protection, not due process, as the essential basis for the majority's holding of unconstitutionality. Due process once again appeared to be of questionable significance in the adjudication of economic and social regulatory schemes.

A novel equal protection issue was presented in *G.D. Searle & Co. v. Cohn*,[63] in which the Court attempted to establish the extent of time limitations for an action instituted against an out-of-state corporation. The case arose from a suit by a New Jersey couple against an Illinois-based pharmaceutical firm, the manufacturer of an oral contraceptive which, the couple charged, had caused the wife to suffer a stroke. For whatever reasons, the action was filed eleven

60. *Id.* at 440.
61. *Id.* at 442.
62. *Id.* at 443-44.
63. 455 U.S. 404 (1982).

years after the event under New Jersey's long-arm rule that permitted extraterritorial service to the full extent permitted by the federal constitution. The corporation's initial response was to remove the case to federal court and to invoke the state's two-year statute of limitations. To this defense, the couple replied by citing a tolling provision that removed the prescribed restriction.

Since Searle had no officer in the state for service of process, it was treated as an unrepresented foreign corporation under the prevailing law. Consequently, in that capacity the company was denied the benefits of the state's statute of limitations, which is designed in most instances to prevent a timeworn claim from being pursued. By contrast, registered and local corporations functioned under no such disability, the differential being tied ostensibly to the ease of locating the companies and of making them amenable to the state's legal processes. A tolling statute, applicable to nonrepresented foreign corporations, served to eliminate time-related barriers.[64] In effect, then, the Cohns, in bringing this action against Searle, availed themselves of mechanisms for relief that ranged well beyond those that would have been applicable had the suit involved either a domestic or a represented company.

Was such a differentiation, premised upon corporate status, warranted and, if so, was it sustainable within the accepted framework of equal protection analysis? A majority, speaking through Justice Blackmun, noted that a rational basis test sufficed to support the distinctions drawn. There was no reason to move to a heightened level of scrutiny, Justice Blackmun asserted, since the constitutional challenges did not implicate any suspect or kindred classifications. As such, the distinctions survived minimal review by reason of the anticipated difficulty of reaching non-represented foreign corporations, always a potentially elusive and perilous legal venture despite the existence of long-arm jurisdiction. The state's refusal to extend the shelter of the statute of limitations, Justice Blackmun made clear, met a constitutional standard that required no more than that the law be "rationally related to the achievement of legitimate governmental ends."[65] Moreover, the Court concluded, the foreign corporation could always fall back upon the defense of laches to bar the claim if delay was inexcusable and prejudicial.[66]

64. Conflicting opinions concerning the status of the tolling provision were reflected in Cohn v. G.D. Searle & Co., 447 F. Supp. 903 (D. N.J. 1978) and, on consolidated appeals, in Hopkins v. Kelsey-Hayes, Inc., 628 F.2d 801 (3d Cir. 1980).

65. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982).

66. *Id.* at 411.

The separate opinions in *Searle* differ more in emphasis than in categorical doctrinal terms. Justice Powell, joined by Chief Justice Burger, concurred without reservation in the equal protection segments of the majority's reasoning. Their disagreement lay in the Court's failure to resolve commerce clause questions that Justice Blackmun had found clouded by ambiguity and inadequately considered in the courts below.[67] Returning to the equal protection issue, Justice Stevens' dissenting opinion did not take exception to the choice of a rational basis standard or the need for disparate treatment. Instead, his objection related to the special burden imposed upon foreign corporations and to the notably harsh results to which it might lead. To reduce the onus of responsibility upon unregistered companies, Justice Stevens proposed a lesser remedy, that being an extended period for plaintiffs to initiate suits but not the elimination of all time restraints.[68]

In retrospect, if, as Justices Blackmun and Stevens observed, the questions presented in *Searle* were novel, perhaps they were so because equal protection was an inappropriate choice as the basis of decision. An examination of the due process minimal contacts issues of the past was all but abandoned as the state's jurisdiction was freely conceded and affirmed. But it may be that, as Justice Powell urged, the commerce clause questions were the pivotal ones, although full-scale consideration was postponed for another day. Did not the registration requirement, a condition to be met before a foreign corporation might benefit from the statute of limitations, place an undue burden on interstate commerce? By submitting to registration, the company, while engaged solely in interstate commerce, had to assume all of the liabilities of a domestic corporation. Viewed in this light, was not the tolling provision an unconstitutional tool of coercion, violative of the commerce clause? Did not the state virtually compel compliance, the corporation's alternative being to risk continued exposure to suit?

Should a commerce clause predicate ultimately prevail, it would take *Searle* out of the mainstream of opinions descriptive of the doctrine of deference. Whenever adverse effects upon commerce can be demonstrated, review is of a different order from that applied in an equal protection context. The state's regulatory power, weighed against the national interest in preserving an unfettered flow of interstate commerce, has always been assigned a subordinate position. A

67. *Id.* at 413-14.
68. *Id.* at 420.

far more compelling justification is called for in sustaining the state's role. Thus *Searle* may not figure as a deferential review case at all if, as seems likely, it reveals itself as a commerce clause case masquerading under the banner of equal protection.

When out-of-state wholesalers charged state-sponsored discrimination against their products, the Court reasserted the centrality of commerce clause interests with considerable vigor. At issue in *Bacchus Imports, Ltd. v. Dias*[69] was the validity of Hawaii's tax exemption for specified indigenous beverages. The state disclaimed any competitive threat to other liquors despite the legislature's previously avowed purpose to encourage and to promote a new industry. Justice White, writing for the Court, found discrimination in favor of local products contrary to a "central tenet" of the commerce clause.[70] Since the exemption was intended to assist domestic enterprise and unavoidably some competition existed between the favored products and non-exempt liquors from outside the state, the exemption had a discriminatory effect — one linked to economic protectionism and Balkanization — violative of traditional commerce clause principles. The state's invocation of the twenty-first amendment did not save the challenged tax, a majority noted, since its provisions were not sufficiently implicated by the exemptions. Hawaii's tax scheme was not intended to promote temperance or to facilitate the imposition of restrictions on trafficking in alcoholic beverages. Instead, it erected barriers to competition and sought to circumvent commerce clause safeguards unrelated to the twenty-first amendment's design.[71]

Justice Stevens, joined in dissent by Justices Rehnquist and O'Connor, took issue with the Court's truncated approach to the twenty-first amendment.[72] Since the tax applied to local sales of liquor, Stevens argued, it fell within the amendment's reference to "delivery or use therein."[73] The state's protection of its internal market need not be confined to ordinary commerce clause proscriptions concerning the regulation of interstate trade. The dissenters were not willing to accept inquiries into issues of economic protectionism, the level of deference to be extended or the "central purpose" of the twenty-first amendment. The force of its language was said to suffice in sanctioning what the state had undertaken to accomplish.[74]

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69. 468 U.S. 263 (1984).
70. *Id.* at 276.
71. *Id.* at 275-76.
72. *Id.* at 279-80.
73. *Id.* at 280.
74. *Id.* at 282-87.

If the Court succeeded in avoiding equal protection arguments and in according primacy to the commerce clause in *Bacchus Imports*, a reversal of course occurred the following year in *Metropolitan Life Insurance Co. v. Ward*.[75] A return to a heightened rational basis test as the predicate of choice led a majority to relegate commerce clause considerations to a subsidiary status. Without explicitly denigrating congressional control over commerce, the Court elected to emphasize the equal protection component well-nigh exclusively in a context notably analogous to that in *Bacchus Imports*. An inquiry into judicial motivations is always a hazardous if not a futile venture, but it is difficult to dismiss in a cavalier manner the majority's purposeful, articulated commitment to equal protection. Dissenting opinions may reflect a writer's penchant for hyperbole and self-indulgence, a sense of abandon because of a failure to maintain fragile coalitions, or strongly held views concerning not only a distasteful outcome but also an abrupt and arguably unwarranted turn in the decision-making process. It may have been the latter that prompted Justice O'Connor, who wrote for the four dissenters in *Metropolitan Life*, to characterize the prevailing opinion as "astonishing," an "unfortunate adventure" and one that charts an "ominous course."[76]

What occasioned so harsh a response to an opinion by Justice Powell, a doctrinal moderate and an able craftsman? *Metropolitan Life*, in many respects, presented familiar charges of state discrimination against out-of-state insurance companies. Alabama's domestic preference tax clearly favored in-state companies while a collateral scheme permitted outsiders to reduce the tax differential by capital investments in stipulated state assets and government securities. A resort to the commerce clause might have sufficed to strike down the offensive levy as discriminatory but for the McCarran-Ferguson Act,[77] which exempted the insurance industry from commerce clause restraints. Plainly an alternate route had to be pursued if the state law was to be set aside. To this end, Powell moved to equal protection as the basis for holding that the statute served no legitimate state purpose and hence could not be sustained. Yet the cost exacted was substantial. The rational basis test had to be applied with unaccustomed rigor if the Court was to deal with "parochial" discrimination. Even worse, the Court was compelled to distinguish commerce clause and equal protection analysis, implying that the former, and

75. 105 S. Ct. 1676 (1985).
76. *Id.* at 1684, 1694.
77. 15 U.S.C. §§ 1011-1015 (1984).

perhaps Congress itself, could not limit the applicability of the latter.

It was this differentiation, as well as the level of equal protection review, that gave rise to Justice O'Connor's spirited dissent. Joined by Justices Brennan, Marshall, and Rehnquist, she took the majority to task for departing from the deference due a tax classification when measured against minimal equal protection standards. The notion that a state purpose might be acceptable under the commerce clause but suspect within an equal protection context struck her as merely "another pretext" to evade established precedents.[78] Justice O'Connor raised the specter of a reversion, however minute, to the "heyday of economic due process" and the discredited doctrines of *Lochner v. New York*.[79] The assignment of Congress' commerce power to a subordinate status, if pursued, would create an "economic straightjacket on the federal system."[80] She urged abandonment of this "ominous" course and a return to familiar guidelines that had long served the nation.[81]

That the rational basis test no longer may be looked upon as an instrument for the affirmation of an almost boundless presumption of validity has become increasingly apparent. Several months following the Court's decision in *Metropolitan Life*, an equal protection challenge was raised by banks excluded from a regional banking arrangement authorized by the laws of several states. Once again there was no question of a dormant commerce clause premise since Congress had acted positively in relation to banking. Yet a unanimous Court, speaking through Justice Rehnquist, who was among the dissenters in *Metropolitan Life*, concluded that the regional scheme met a traditional rational basis test and did not intrude upon compact and commerce clause interests. The prevailing opinion in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*[82] focused on the local nature of banking institutions and the state's interest in protecting them from incursions by mammoth financial corporations seeking to extend their effective reach. Justice O'Connor, concurring, found little to distinguish *Northeast Bancorp* from *Metropolitan Life* except the outcome. She expressed satisfaction with the Court's return to longstanding equal protection doctrine. It was not clear, she averred, why the "Equal Protection clause should tolerate a regional 'home team' when it condemns a

78. *Metropolitan Life*, 105 S. Ct. 1691.
79. *Id.* at 1693 [citing Lochner v. New York, 198 U.S. 45 (1905)].
80. *Id.* at 1694.
81. *Id.*
82. 105 S. Ct. 2545 (1985).

state 'home team.' "[83]

The Court's reluctance to extend a strict or heightened scrutiny test beyond existing precedents led to a searching reexamination of equal protection standards. At issue in *City of Cleburne v. Cleburne Living Center*[84] was the validity of a municipal ordinance requiring a special use permit for the operation of a group home for the mentally retarded. When the city denied the permit, the owners filed suit, charging that the zoning ordinance violated their equal protection rights and those of potential residents. A federal district court sustained the constitutionality of the ordinance, but the Court of Appeals for the Fifth Circuit reversed, holding that mental retardation was a quasi-suspect classification calling for intermediate-level, heightened review.[85] That an additional group had been added to one of the "exceptional" categories invited a reassessment of the Supreme Court's haphazard pronouncements of the past several decades.

The prescriptive categories created — ranging from a minimal rational basis test through intermediate review to strict scrutiny — were neither well defined nor capable of being translated into exacting measures of constitutionality. Justice White, who wrote for the Court in *Cleburne*, noted that any level of review above rational basis would give rise to substantive judgments concerning legislative acts.[86] Perhaps it was this distasteful recognition of judicial intrusiveness, coupled with the ever-present need to preserve decisional options, that fostered the application of rationality criteria when they were neither appropriate nor effective. There are elements of incongruity in the Court's invalidation of the controversial ordinance, its finding of "irrational prejudice"[87] against the mentally retarded and the confounding assertion that no "more exacting standard"[88] is required. As Justice Rehnquist had complained almost a decade earlier when intermediate review was introduced, the phrases were so "diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . ."[89]

The majority's enigmatic formulations elicited a trenchant dissent from Justice Marshall, joined by Justices Brennan and Black-

83. *Id.* at 2556.
84. 105 S. Ct. 3249 (1985).
85. 726 F.2d 191 (5th Cir. 1984).
86. *City of Cleburne*, 105 S. Ct. at 3256.
87. *Id.* at 3260.
88. *Id.* at 3256.
89. Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

mun. Not only did Justice Marshall condemn the Court's penchant for a wide-ranging description of heightened scrutiny as "superfluous,"[90] but he also went on to label the method adopted as " 'second order' rational basis review"[91] — clearly not the test invoked in regulatory cases when an expansive doctrine of deference still prevailed. He expressed misgivings that such review might endanger economic classifications by encouraging a "small and regrettable step back toward the days of *Lochner v. New York*."[92] In closing, Justice Marshall protested the Court's "as-applied" approach to the ordinance in question and lamented the lack of guidance as to when the "free-wheeling and potentially dangerous"[93] new standard was to be employed.

The notion of an unremitting deference is no longer feasible. The rational basis test has been transformed into a far less reliable validating tool than any previously envisioned. It remains problematical whether the Court's almost desperate effort to avoid the creation of additional categories of heightened scrutiny has been worth the resulting equivocation concerning the nature of minimal review. Outcomes are not predictable even if, as seems likely, the probability of the Court's reversion to a "superlegislative" status in the examination of economic legislation continues to be remote. The grey areas in question relate to the status and treatment of disadvantaged social groups seeking to protect their rights and interests. That a double standard prevails is evident in Justice O'Connor's sweeping opinion in *Hawaii Housing Authority v. Midkiff*,[94] in which "old style" deference was vigorously reaffirmed by a unanimous Court. "When the legislature's purpose is legitimate and its means are not irrational," Justice O'Connor asserted, "our cases make clear that empirical debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts."[95] Such broad generalizations are difficult to reconcile with the Court's current ruminations.

During the past several years, divergencies among the levels of review have grown increasingly pronounced and notably difficult to accommodate. The rational basis test has become more rigorous generally, but it has shown signs of reverting to a traditionally more

90. *City of Cleburne*, 105 S. Ct. at 3263.
91. *Id.* at 3264.
92. *Id.* at 3265.
93. *Id.* at 3275.
94. 467 U.S. 229 (1984).
95. *Id.* at 243.

permissive state when the initiating force underlying the federal police power is explicitly tied to the commerce clause. What is more, considerations of federalism have not been persuasive in diminishing the deference due Congress. The vigor previously ascribed to the tenth amendment has proved to be fleeting in nature and, if current trends serve, it may well return to the moribund state to which it had been relegated in the late 1930s. A majority apparently has had second thoughts about effecting a marked diminution of national regulatory authority, even if the areas selected are modestly and carefully defined.

Justice Brennan, writing for the Court in the 1983 case of *EEOC v. Wyoming*,[96] came close to overruling *National League of Cities*. With a transfer of Justice Blackmun's vote, the dissenting minority in the 1976 decision became the majority in the Wyoming case. The principal issue centered about the applicability of the Federal Age Discrimination in Employment Act to a state employee who had been required to retire at the age of fifty-five when the national standard for involuntary separation was seventy. A federal district court dismissed the Government's suit in support of the employee's claim, citing *National League of Cities* as the controlling precedent. Objections to enforcement against the states of minimum wage and maximum hour provisions of the Fair Labor Standards Act, Judge Brimmer declared, were comparable to those that might be raised with respect to the age discrimination act.[97]

The Supreme Court majority made much of the lesser degree of federal intrusion in the Wyoming case. Though the age act admittedly regulated the states as states and dealt with matters customarily left to the states, Justice Brennan asserted, its effect upon traditional state functions was not direct or patently intrusive. The principle of immunity derived from *National League of Cities* was functional; its ultimate purpose was "not to create a sacred province of state autonomy."[98] Consequently, Justice Brennan found that the age act did not impair the state's ability to "structure integral operations" in areas of traditional state concern and so met the elemental precepts of the 1976 decision.[99] Chief Justice Burger, in a dissenting opinion, remarked upon the majority's reading of the Constitution that permitted congressional usurpation of a "fundamental state

96. 460 U.S. 226 (1983).
97. EEOC v. Wyoming, 514 F. Supp. 595, 598, 600 (D. Wyo. 1981).
98. EEOC v. Wyoming, 460 U.S. at 236.
99. *Id.* at 239.

function."[100]

The Court went on to explicitly overrule *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,[101] sustaining the application of the Fair Labor Standards Act's wage and hour provisions to employees of a municipally owned transit system. Speaking for the same majority that prevailed in the Wyoming case, Justice Blackmun moved to a major restatement of guidelines describing the nature of contemporary federalism and of the Court's role in the American constitutional system. Blackmun found unworkable previous efforts to distinguish traditional from nontraditional state functions in establishing the boundaries of regulatory immunity.[102] When the affirmative powers of Congress under the commerce clause are being assessed, he asserted, the Court has "no license to employ freestanding conceptions of state sovereignty."[103] Restraints on the exercise of national authority and cognate mechanisms for the protection of states in the federal system were said to be largely procedural, the products of internal safeguards rooted in the political process.[104]

Responding to the majority's implicit suggestions of a virtually unlimited commerce power and of an almost non-existent tenth amendment, Justice Powell took exception to the abrupt departure from recent precedents and, more significantly, to what he viewed as a grossly distorted notion of federalism. Powell, in a spirited dissent, referred to an "emasculation" of state powers and "federal overreaching" by way of an expansive reading of the commerce clause.[105] He denied claims that the political process served as the principal means of preserving state interests. The role of states in the federal system, he insisted, was not a matter of official grace but of constitutional structure dating from the founding of the Republic. Justice Powell further criticized the majority for its apparent rejection of the judiciary's review function in protecting the essential bases of American federalism.[106]

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100. *Id.* at 251. Justice Stevens, in a sharply worded concurring opinion, called for "a prompt rejection of *National League of Cities*' modern embodiment of the spirit of the Articles of Confederation." *Id.* at 250. His comments concerning the centrality of the commerce power in giving rise to the Constitution itself prompted a gratuitous rejoinder from Justice Powell, joined in dissent by Justice O'Connor. *Id.* at 265-66. For a similar division, see the several opinions in FERC v. Mississippi, 456 U.S. 742 (1982).

101. 105 S. Ct. 1005 (1985).

102. *Id.* at 1007.

103. *Id.* at 1017.

104. *Id.* at 1019-21.

105. *Id.* at 1029.

106. *Id.* at 1026-27.

If the dissenting opinions of Justices Rehnquist and O'Connor were less persuasive than Justice Powell's carefully reasoned discourse, they were no less critical of the majority's performance. Justice O'Connor, in particular, objected to the Court's demeaning characterization of state sovereignty. She went on to point out that the "judicially crafted" expansion of the commerce power, reflecting acknowledgement of an integrated national economy, had been designedly offset by limitations imposed on federal regulatory authority.[107] Both Justices Rehnquist and O'Connor predicted that the new majority's holding would be short-lived and that the principles of *National League of Cities* would soon be revived.

In retrospect, the elusive quest for doctrinal symmetry — setting aside the only case that had negated congressional power under the commerce clause for close to half a century — accomplished little. The *National League of Cities* criteria, by their very ambiguity, had furnished the materials out of which inventive judges might have fashioned viable predicates. A majority need not have sought to reassume a mien of self-abnegation. Instead, the Court could have reaffirmed its historic role of monitoring the federal system while avoiding the extension of an unrestrained discretion to Congress. Justice Blackmun's references to safeguards derived from the political process failed to provide an adequate substitute for carefully developed judicial indicia. In the final analysis, the issue narrowed to a choice between congressional federalism as a standard or a resort to less intrusive measures associated with constitutional federalism.

III. Conclusion

If the revival of meaningful review at the national level has been sporadic and, at times, lacking in continuity, the effort itself holds promise, particularly with respect to state legislation. The Court is no longer tied to a pattern of deference so extreme or so rigid as to raise serious doubts concerning the efficacy of the review function. A progression of cases, though hardly conclusive in their cumulative effects, may signal the opening of a new era or, perhaps more accurately, a return to an updated version of pre-Darwinist moderation. There is little evidence of the blatant and palpable incursions of the pre-1937 years when judicial supremacy and "superlegislative" status were bywords for a pervasive negativism that threatened to impede the course of social progress. All the

107. *Id.* at 1035-37.

same, the Court has made it clear that regulatory legislation as such does not lie beyond the scope of judicial scrutiny. Emphatically absent is a cloistered or privileged zone that, for whatever historical or psychological reasons, the Roosevelt Court and its successors had wholly immunized from any form of intervention.

For several decades, the notion persisted that the Court had taken as its special responsibility the protection and expansion of individual liberties in a leviathanic state. Chief Justice Stone's famous footnote in the *Carolene Products* case lent credence to the idea that specified rights were "preferred" and, therefore, worthy of an unusually high level of judicial protection to ensure the survival and proper functioning of the democratic process.[108] It was this impetus that served to encourage the development of suspect classifications and fundamental rights that, in effect, required a reversal of the usual presumption of validity. Notably omitted from the Court's solicitude were economic rights that somehow were treated as of lesser concern. The fiction persisted that parallel lines of development could be maintained, that crossings and clashes between the two categories would never occur, and that the preservation of economic rights was best left to representative bodies.

That equal protection has been selected as the basis of intervention may be the result of historical factors as well as of contemporary practices. The ignominy that attached to due process as a tool of judicial negativism could not readily be set aside. So it was that the clause, and particularly its liberty provision, served more appropriately as the catalytic agent for the piecemeal nationalization of the Bill of Rights and, more recently, for the establishment, by judicial fiat, of a new bill of rights with personal autonomy as its capstone. Equal protection, by contrast, revealed a nondescript past, less compelling precedents, and prospects for generating standards of judgment that were said to provide flexibility and discretion in the sensitive economic regulatory area. Apart from the protection of human rights, then, the vitality of equal protection as the basis of judicial activism will be determined by the nature of the glosses placed upon the rational basis test as a "minimum" deterrent to legislative excesses or capricious ventures.[109] Whether equal protection rationality offers a range of options comparable to those previously

108. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

109. For an intriguing if speculative variant of routine applications, see City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). The rationality test in *Mesquite* was reconsidered within a context noteworthy for the Justices' spirited reexamination of independent state grounds.

available but repeatedly misued when linked to due process analysis remains an open question.